IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO.6782 OF 2005

Shri Champalal Devichand Gandhi & Anr. : Petitioners
(Orig.Defendants)

V/s.

M/s.Sandesh Agency : Respondent
(Orig. Plaintiff)

...

Mr.P.J.Pawar for the petitioners.

Mr.S.S.Salunkhe for the respondent.

...

CORAM : S.A. BOBDE, J.

October 25, 2005.

P.C.

1. Rule, returnable forthwith.

Mr.Salunkhe for the respondent waives service of rule.

Heard by consent.

2. In the last para of the impugned order, the trial Court has made the following observations granting conditional leave to defend to the petitioners:-

After going through the documents produced by the plaintiff and considering the defence of the defendant, I am of the opinion that, defendants raised triable issue indicating that he has a fair, bona fide or reasonable defence although not a positively good defence. Under such circumstances, I am of the opinion that, application of defendants deserves to be granted and leave to defend is necessary to granted (sic) on condition to deposit the suit amount. Accordingly I answer point No.1 in the affirmative. With these I proceed to pass the following order.

O R D E R

1. Application is allowed.

2. Leave to defend is granted in favour of defendants on condition to deposit the amount of Rs.2,35,931.39 Ps. In the Court within two months from today.

3. If the defendants failed to deposit

the said amount within said period, the order granting leave to defend stands vacated automatically.;

4. On deposit of the said amount A.S.(Nazir) is hereby directed to invest the said amount in fixed deposit in Nationalised Bank for the period of One Year."

Thereupon the trial Court has granted leave to the petitioners to defend on condition to deposit Rs.2,35,931.39.

3. The learned counsel for the petitioners relied on the decision of the Supreme Court in Sunil Enterprises v. SBI Commercial & International Bank Ltd. [(1998) 5 SCC 354] where in para 4, the Supreme Court has summed up the propositions as follows:-

"4. The position in law has been explained by this Court in Santosh Kumar v. Bhai Mool Singh, Milkhiram (India) (P) Ltd. v. Chamanlal Bros. and Mechelec Engineers & Manufacturers v. Basic Equipment Corpn.

The propositions laid down in these decisions may be summed up as follows:

(a) If the defendant satisfies the Court that he has a good defence to the claim on merits, the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence, although not a possibly good defence, the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is, if the affidavit discloses that at the trial he may be able to establish a defence to the plaintiff’s claim, the court may impose conditions at the time of granting leave to defend--the conditions being as to time of trial or mode of trial but not as to payment into court or furnishing security.

(d) If the defendant has no defence, or if the defence is sham or illusory or practically moonshine, the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine, the court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into court or otherwise secured.

In fact in identical matters on the file of the said High Court in Summary Suit No.2963 of 1990 Dena Bank v. Sunil Enterprises and Summary Suit No.1153 of 1989 Bank of India v. Mahendra Sarabhai Choksi, leave to defend had been granted to the defendants."

Obviously, the aforesaid observations of the trial Court is to the same effect as those in clause (b) above.

However, the conclusion of the trial Court is contrary to the observations of the Supreme Court.

4. In the circumstances, the impugned order is set aside. The trial Court is directed to reconsider the matter afresh and in accordance with law. All contentions of the parties are left open. The trial Court is directed to decide the application, as expeditiously as possible, and in any case, not later than 24.11.2005.

4. The rule is made absolute in the above terms.

5. Writ to go down forthwith.

Sd/-

S.A. BOBDE, J.